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No. 09-160

Supreme Court, U.S.
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Supreme Court of the United States

UNITED STATES DEPARTMENT OF DEFENSE, ET AL.,

Petitioners,

—v.—

AMERICAN CIVIL LIBERTIES UNION, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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TABLE OF CONTENTS

SUPPLEMENTAL STATEMENT 1

ARGUMENT 4

CONCLUSION 7

TABLE OF AUTHORITIES

Cases

Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27 (1993) 6

Lawrence v. Chater, 516 U.S. 163 (1996) 5, 6

Lords Landing Vill. Condo. Council of Unit Owners v. Cont'l Ins. Co., 520 U.S. 893 (1997) 5

U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18 (1994) 6

Statutes and Rules

Fed. R. Civ. P. 60 ..... 1, 6, 7

Freedom of Information Act, 5 U.S.C. § 552 1

5 U.S.C. § 552(b)(7)(F) 2

Protected National Security Documents Act of 2009, Pub. L. No. 111-83, § 565, 123 Stat. 2142, 2184-86 ..... 4, 7

Sup. Ct. R. 15.8 1

Pursuant to Rule 15.8 of the Rules of this Court, Respondents file this supplemental brief to oppose the government's request that this Court grant the certiorari petition, vacate the Second Circuit's decision, and remand for further proceedings. As set forth more fully below, the Court should simply deny the government's petition for a writ of certiorari, leaving undisturbed the unanimous and well-reasoned decision of the appeals court. The government may then raise its new claim of withholding—a claim based upon a new statute unrelated to the legal basis for the Second Circuit's decision—in the district court pursuant to Rule 60 of the Federal Rules of Civil Procedure.

SUPPLEMENTAL STATEMENT

This case concerns the public's right to know about the treatment of prisoners held by the U.S. government overseas. It arises from requests filed by Respondents under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, after news organizations reported that prisoners held by the Department of Defense and Central Intelligence Agency had been abused, tortured, and in some cases killed in custody. Respondents' FOIA requests, filed in October 2003 and May 2004, sought records concerning the "treatment of Detainees" held by the United States overseas, the "deaths of [such] Detainees" in custody, and the "rendition of Detainees and other individuals" to countries known to use torture. Respondents commenced the instant litigation in June 2004 to enforce their FOIA requests.

Among the records responsive to Respondents' FOIA requests are forty-four images—plus an unspecified but "substantial number" of additional images, Pet. App. 185a—depicting the mistreatment of detainees held in at least seven different locations in Afghanistan and Iraq. On September 22, 2008, a unanimous panel of the Second Circuit ordered the government to disclose a subset of these photographs.[1] It rejected the government's invocation of FOIA Exemption 7(F), 5 U.S.C. § 552(b)(7)(F) holding that the government must do more to satisfy the narrow law-enforcement exemption than "point to a group composed of millions of people and establish that it could reasonably be expected that someone in that group will be endangered" by disclosure. Pet. App. 11a.

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[1] On September 29, 2005, the district court ordered the disclosure of images of detainee abuse taken by Joseph Darby at Abu Ghraib prison. Pet. App. 74a, 110a-133a. The government appealed from that judgment, but the parties stipulated to the dismissal of the appeal after the images at issue were published by a news organization. *Id.* at 66a-67a. The government subsequently identified twenty-one additional responsive images, *id.* at 61a-62a, 67a, and agreed that the disclosure or withholding of those images "based on FOIA Exemptions 6, 7(C), and/or 7(F)," as well as any photos subsequently withheld on the same bases, would be governed by the final ruling on appeal as to the twenty-one images at issue here, *id.* at 69a. The district court ordered the disclosure of the twenty-one images on June 21, 2006. *Id.* at 61a-62a. On June 29, 2006, the government informed Respondents that it possessed an additional twenty-three images responsive to Respondents' requests, *id.* at 6a n.2, and on May 28, 2009, it acknowledged the existence of an unspecified but "substantial number" of additional responsive images, *id.* at 185a.

In response to the Second Circuit's disclosure order, Congress passed and the President signed the Protected National Security Documents Act of 2009, Pub. L. No. 111-83, § 565, 123 Stat. 2142, 2184-86. The Act authorizes the withholding of certain records otherwise subject to disclosure under FOIA. Specifically, subsection (b) of the Act states that "no protected document, as defined in subsection (c), shall be subject to disclosure under [FOIA] or any proceeding under [FOIA]." Subsection (c), in turn, defines "protected document" to mean any photograph: (1) that "was taken during the period beginning September 11, 2001, through January 22, 2009," (2) that "relates to the treatment of individuals engaged, captured, or detained after September 11, 2001, by the Armed Forces of the United States in operations outside of the United States," and (3) "for which the Secretary of Defense has issued a certification, as described in subsection (d), stating that disclosure of that record would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States."

Subsection (d) states that "the Secretary of Defense shall issue a certification" for any such photograph if the Secretary "determines that disclosure of that photograph would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States."

On November 13, 2009, the Secretary of Defense issued a certification under the Act with respect to "a collection of photographs . . . assembled by the Department of Defense that were taken in the period between September 11, 2002 and January 22, 2009, and that relate to the treatment of individuals engaged, captured or detained after September 11, 2001 by the Armed Forces of the United States in operations outside the United States." The certification states that "[t]hese photographs are contained in, or derived from, records of investigations of allegations of detainee abuse," and that the Secretary has "determined that public disclosure of these photographs would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States."

On the same day, the government filed a supplemental brief apprising the Court of the certification and requesting that, in light of the certification, the Court grant the certiorari petition, vacate the Second Circuit's decision, and remand for further proceedings.

ARGUMENT

As explained in Respondents' Brief in Opposition, the Second Circuit correctly determined that FOIA Exemption 7(F) does not authorize the government to withhold prisoner-abuse photographs based upon a general assertion that release of the photographs could provoke a violent response. The government now seeks to avoid disclosure of the

photographs by invoking a new and wholly unrelated statute, and it asks that the Court first grant the certiorari petition, vacate the Second Circuit's decision, and remand for further proceedings ("GVR"). Respondents agree that the lower courts should address the government's new argument in the first instance; however, where, as here, the intervening statute does not undermine or bear upon the lower court's decision, and the lower court's decision is correct, the Court should simply deny the petition for a writ of certiorari, allowing the government to raise its new claim in the district court pursuant to Rule 60 of the Federal Rules of Civil Procedure.

The primary inquiry underlying this Court's "sparing[]" exercise of its authority to issue a GVR order is: whether intervening developments "reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence v. Chater*, 516 U.S. 163, 167, 173 (1996); *Lords Landing Vill. Condo. Council of Unit Owners v. Cont'l Ins. Co.*, 520 U.S. 893, 896 (1997). That condition is not satisfied here. The Second Circuit's decision concerned the government's reliance upon Exemption 7(F). The intervening statute and certification by the Secretary do not call into question the validity of that decision. They merely raise the independent question of whether suppression of the photographs is now proper pursuant to the Secretary's certification. Thus, the intervening event is unrelated to the underlying decision and does not warrant a GVR order.

"Whether a GVR order is ultimately appropriate depends further on the equities of the case . . . ." *Lawrence*, 516 U.S. at 167-68. The equities in this case also counsel against the relief the government seeks. Denying the government's petition for a writ of certiorari, in lieu of issuing a GVR order, would not prejudice the government's ability to argue before the lower courts that withholding of the photographs is now proper pursuant to the Act and the Secretary's certification. *See* Fed. R. Civ. P. 60. Vacating the Second Circuit's decision would, however, needlessly impair Respondents' ability to rely on the Second Circuit's sound interpretation of Exemption 7(F) should another controversy arise in this long-running and wide-ranging FOIA litigation that does not involve photos or that involves photos that the Secretary has not certified under the new legislation. Likewise, a GVR order would vitiate the precedential impact of the Second Circuit's decision for other litigants and courts in FOIA disputes that have nothing to do with the subjects covered by the Protected National Security Documents Act of 2009, which the government seeks to invoke here. *Cf. U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26-27 (1994) ("'Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur.'" (quoting *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 40 (1993) (Stevens, J., dissenting))).

Accordingly, the Court should deny the government's petition for a writ of certiorari. The government will then remain free, if it chooses, to seek further relief from the district court pursuant to Rule 60 of the Federal Rules of Civil Procedure.

CONCLUSION

For the reasons stated herein, and in Respondents' Brief in Opposition, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

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